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MICHAEL RODAK, JR., CLERK

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977

No. **77-786**

JEROME E. MOORE, *Petitioner*

v.

RICHMOND, FREDERICKSBURG AND  
POTOMAC RAILROAD

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**PETITION FOR WRIT OF CERTIORARI**

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IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1977  
No. \_\_\_\_\_

JEROME E. MOORE , Petitioner

v.

RICHMOND, FREDERICKSBURG AND POTOMAC RAILROAD

PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

JEROME E. MOORE, Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on June 13, 1977.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 13, 1977. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTIONS PRESENTED

Whether there has been discrimination because of race in the discharging of a black employee for violation of employer rules where a white employee who violated the same rules was not discharged.

### STATUTES INVOLVED

This action is brought to enforce the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C., Section 2000e - et seq., as amended by the Equal Employment Opportunity Act of 1972.

### STATEMENT OF THE CASE

This case originated in the United States District Court for the Eastern District of Virginia which, by order dated July 9, 1976 denied relief under Title VII of the Civil Rights Act of 1964, as amended, to Petitioner, who had been discharged by the Richmond, Fredericksburg and Potomac Railroad allegedly because of his race, the Court finding that "race played no part in the plaintiff's discharge".

Petitioner (black) was employed by the Richmond, Fredericksburg and Potomac Railroad as a car repairman-helper until March 24, 1972 when he was discharged after being taken into custody by the F.B.I. the night before in connection with a theft of whiskey from appellee. Subsequently, after a hearing, Petitioner was not criminally prosecuted.

Another employee (white) was similarly apprehended and found to have violated the same regulations as Petitioner. He was suspended for a period of time (twenty-

nine days). This was the extent of his treatment--he was not discharged.

Petitioner claims that he was racially discriminated against by being discharged and argues that the failure to discharge the other employee evidences this discriminatory intent.

### REASON FOR GRANTING

The decisions of the lower courts are in conflict with the principle of McDonald v. SantaFe Trail Transportation Co., 96 S. Ct. 2574 (1976) that where employees of different races are involved in a theft, the discharge of one, and not the other without adequate justification, is a prima facie case of discrimination. "While SantaFe may decide that participation in a theft of cargo may render an employee unqualified for employment, this criterion must be 'applied alike to members of all races' and Title VII is violated if, as petitioners allege, it was not" Id. at 2579-80. The facts in this case are remarkably similar to those in McDonald. The Richmond, Fredericksburg and Potomac's explanation does not meet the test of McDonald--it is not a reasonable explanation--rather it avoids explaining at all and the acceptance of it by District Court is error. Such type of error, in discrimination cases, flaunts

existing principles and sets a dangerous precedent--in effect the Court is requested to exercise its supervision powers to cure this misapplication of the law.

CONCLUSION

Richmond, Fredericksburg and Potomac's explanation of its treatment of employee similarly situated to Petitioner found to be an acceptable explanation by the lower courts for treating him differently from Petitioner though they had both violated the same employer rules, is unreasonable and the rulings of the lower courts should be reversed to avoid a travesty of justice.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

John M. Wells  
Counsel for Petitioner

## **APPENDIX**



United States Court of Appeals  
For The Fourth Circuit

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No. 76-1952

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JEROME E. MOORE,

Plaintiff-Appellant,

v.

RICHMOND, FREDERICKSBURG AND  
POTOMAC RAILROAD CO.,

Defendant-Appellee.

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Appeal from United States District Court for  
the Eastern District of Virginia. Oren Lewis,  
District Judge.

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Argued May 2, 1977. Decided June 13, 1977

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Before WINTER and MOORE,\* Circuit Judges, and  
THOMSEN,\*\* District Judge.

Robert B. Fitzpatrick (Geoffrey Judd Vitt,  
Cohen, Vitt and Annand on brief) for Appel-  
lant; Elizabeth L. Lewis (E. Waller Dudley,  
Boothe, Prichard & Dudley on brief) for  
Appellee.

PER CURIAM:

Jerome E. Moore brought this action in the District Court for the Eastern District of Virginia, Alexandria Division, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. &2000(e) et seq., alleging that he was discriminatorily discharged on account of his race by the Richmond, Fredericksburg and Potomac Railroad Co. ("RF&P"). The district court determined after trial that "(r)ace played no part in the plaintiff's discharge" and accordingly denied all relief. We agree with this determination and affirm the dismissal of the action.

Moore, Aubrey Marshall, Theodore Lomax, and Brayton Clemons were apprehended by the FBI on the night of March 24, 1972 after a theft from their employer, Richmond, Fredericksburg and Potomac. Moore, Lomax, and Clemons were charged with participation in the theft, but Marshall was not charged and was released that night. On April 6, 1972, the FBI arrested a fifth employee, Floyd Brown, and charged him also with participation in the March 24 theft. Moore and Lomax are black; Marshall, Clemons, and Brown are white. The four employees who were charged had all previously been under surveillance by the FBI because of informant

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- \* Hon. Leonard P. Moore, United States Circuit Judge for the Second Circuit, sitting by designation.
- \*\* Hon. Roszel C. Thomsen, United States District Judge for the District of Maryland, sitting by designation.
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The Judge did not dismiss the present case on the pleadings; rather, he determined after a trial that Moore's discharge was not racially motivated. There was ample evidence to support this determination. Employees Moore and Marshall were not similarly situated. Criminal charges had been brought against the one, but not the other. The FBI had informant information as to Moore, but not as to Marshall. More importantly, Moore and Marshall were not given significantly unequal treatment. They were both discharged, the only difference being that Marshall's discharge was preceded by a 29-day suspension. The reason for this minor difference in treatment was amply explained by the Richmond, Fredericksburg and Potomac Superintendent who testified at the trial. The district court's determination that this explanation was valid and was not a cover-up for a racially-motivated decision is reinforced by the fact that Moore and Brown, another white employee, received identical treatment.

We conclude that Moore's discharge was not racially motivated, and thus affirm the dismissal of his Title VII action.

information that they had been involved in earlier thefts. The charges were subsequently dropped against Moore; Lomax and Clemons were convicted after trial; Brown was acquitted.

Richmond, Fredericksburg and Potomac charged all five employees with violating company rules and held hearings on the charges against each employee. At the close of the hearings, Moore, Lomax, Clemons, and Brown were discharged. Marshall was suspended for 29 days and discharged.

On August 18, 1975, Moore brought this action against his former employer, alleging that he had been discriminatorily discharged on account of his race. He sought reinstatement and back pay. The gravamen of his complaint was that he had been discharged for the theft whereas Marshall, a similarly situated white man, had merely been suspended.

At the trial, a Richmond, Fredericksburg and Potomac Superintendent testified as to the rationale behind the handling of Marshall's case. Marshall had been charged not only with the March 24 theft, but also with other violations of company rules in connection with a subsequent incident. The 29-day suspension allowed time to place all of the violations on Marshall's record and thus strengthen the



case against him in case he appealed his discharge to the National Railroad Adjustment Board.

Moore argues on appeal that the unequal treatment of Marshall and himself is indistinguishable from the unequal treatment which the Supreme Court found violative of Title VII in McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976). In McDonald, however, the district court had dismissed the complaint on the pleadings. Thus, in reviewing the dismissal, the Supreme Court took all of the plaintiffs' allegations to be true. It summarized the allegations as follows:

"Fairly read, the complaint asserted that petitioners were discharged for their alleged participation in a misappropriation of cargo entrusted to Santa Fe, but that a fellow employee, likewise implicated, was not so disciplined, and that the reason for the discrepancy in discipline was that the favored employee is Negro while petitioners are white." 427 U.S. at 282-283."

If those allegations were true, the Supreme Court held, then Title VII had been violated. Thus, the Court determined that the district court had erred in dismissing the complaint for failure to state a claim, and remanded the case for further proceedings.

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

JEROME E. MOORE, :  
Plaintiff :  
v. : Civil Action No.  
RICHMOND, FREDERICKSBURG & : 75-599-A  
POTOMAC RAILROAD COMPANY, :  
Defendant :

MEMORANDUM OPINION AND ORDER

The plaintiff was discharged by the Richmond, Fredericksburg & Potomac Railroad on March 25, 1972 -- He claims racial discrimination. This Title VII (42 U.S.C. & 2000e, et seq.) suit followed.

The case was heard on stipulations, exhibits and live testimony.

From the record thus made it is clear that that Railroad was then experiencing an unusual amount of thefts from its Potomac Yard -- The F.B.I. and the railroad police had the yard and several of the railroad employees, including the plaintiff, under surveillance.

On the night of March 24, 1972 some twenty-two cases of scotch whiskey were stolen from a freight car in the Potomac Yard.

Shortly after midnight on March 25th the F.B.I. observed two automobiles departing from the Potomac Yard -- Mr. Lomax and the plaintiff were in one -- Mr. Clemons and Mr. Marshall were in the other. These automobiles appeared to be heavily loaded. They were stopped by the F.B.I. on the public highway -- Scotch whiskey was observed in the back seat of both automobiles. The drivers and passengers were then arrested, and several cases of the stolen scotch whiskey were found in the trunk of both automobiles.

The drivers and passengers of both automobiles were employees of Richmond, Fredericksburg and Potomac. All four were taken to the F.B.I. HEADQUARTERS and interrogated -- A complaint was filed against the plaintiff, Lomax and Clemons for violating 18 U.S.C. & 659 -- Marshall was not charged -- He was released that night. The plaintiff was released on bond on April 3, 1972.

All four were suspended from duty by the superintendent of the yard as of March 25, 1972 and charged with violating General Rule K of the Potomac Yard, which prohibits employees from removing anything other than personal belongings from the yard without first securing written permission from the superintendent.

Lomax and Clemons were indicted, tried and convicted in this court on or about September 12, 1972.

The Government dropped all criminal charges against the plaintiff on July 11, 1972.

Hearings were conducted by the Railroad on the Rule K charge pending against Clemons, Marshall, Lomax and the Plaintiff -- Marshall, although duly notified, failed to appear.

All four were found guilty of violating Rule K -- Lomax, Clemons and the plaintiff were discharged as of March 25, 1972 -- Marshall was suspended for twenty-nine working days from March 25th -- He had violated other railroad rules and was discharged for violating those rules.

The plaintiff did not appeal his discharge.

Floyd E. Brown, a Richmond, Fredericksburg and Potomac security officer, was arrested by the F.B.I. on April 7, 1972 and charged with participating in the theft of the aforesaid scotch whiskey -- He was immediately taken out of service. He requested a disciplinary hearing on this charge and one was conducted by the Railroad on June 5, 1972 -- He was later tried in this court on the charge brought by the F.B.I. and was acquitted.

The F.B.I. had informant information prior to the March 24th theft for which the plaintiff was arrested that he was involved in other thefts at the Potomac Yard. They had no information prior to the morning of March 25, 1972 that Marshall was involved -- The F.B.I. agent who swore out a warrant for the plaintiff's arrest stated that he had been observed by the F.B.I. as participating in the theft.

The Union that represented both Marshall and the plaintiff wrote to the superintendent and requested that Marshall be returned to service because no charges had been made against him -- The superintendent had all of this information when he discharged Lomax, Clemons and the plaintiff and suspended Marshall for some twenty-nine days.

The superintendent testified during this hearing that he had already made his decision to discharge Marshall for violating other railroad rules -- That is why he suspended him for riding in the car with the stolen scotch whiskey -- He did it that way because he felt that procedure placed the Railroad in the strongest posture should Marshall appeal to the National Railroad Adjustment Board.

There was ample evidence to support the discharge of all of the Richmond, Fredericks-

burg and Potomac employees involved in removing the scotch whiskey from the freight car in the Potomac Yard on the night in question -- All five of the railroad employees who were found to be connected in any degree with the March 24th theft were ultimately discharged by the Railroad (albeit Marshall's discharge was technically on another ground). Three of these employees are white -- Clemons, Brown and Marshall. Two are black -- Lomax and the plaintiff.

Race played no part in the plaintiff's discharge, and the Court so finds.

Therefore this suit should be dismissed at the cost of the plaintiff.